

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RICKEY L. JOHNSON and DENISE	:	
JOHNSON, h/w	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 98- CV-5657
	:	
STANLEY-BOSTITCH, INC.	:	
Defendant.	:	

MEMORANDUM

Green, S.J.

May 31, 2000

Presently pending is Defendant's Motion for Summary Judgment and Plaintiffs' Response thereto. For the reasons set forth below, Defendant's motion will be denied.

Background

In 1996, Plaintiff Rickey Johnson was employed by Premium Pallet ("Premium") which was in the business of buying, repairing and reselling damaged pallets. Plaintiff's job was to repair the damaged pallets. In doing so, Plaintiff would examine the old pallets, determine if any repairs were necessary, and if so, replace any damaged wood with new wood using a pneumatic nail gun provided to Plaintiff by Premium.

On July 26, 1996, Plaintiff used a nail gun to drive a nail or nails into new wood over a damaged wood pallet he was repairing. Plaintiff states that he saw a spark and felt a pain in his eye. At the time he was making the repair, Plaintiff was not wearing safety glasses nor goggles. Plaintiff claims he suffered a serious eye injury as a result of a nail fired from the gun striking him in the eye. The gun Plaintiff utilized was a model manufactured by Defendant Stanley-

Bostitch. Premium did not purchase the nail gun. Rather, it was provided to Premium by Defendant as a business incentive for Defendant's customers who purchased large quantities of nails and fasteners.

The nail gun Plaintiff used is offered in one of two models: a contact trip and sequential trip. Defendant states that essentially, with a contact trip stapler, it is possible to hold the trigger, and simply press the tip of the nailer against the work surface every time a nail must be released. The sequential trip nailer, however, requires that the operator pull the trigger every time a nail is desired. At the time of the instant incident, Plaintiff was using a contact trip nailer. Plaintiff seeks to recover from Defendant for injuries he sustained resulting from the accident. The Complaint sets forth causes of action for strict liability, negligence, breach of warranty, and a claim by the wife for loss of consortium.

Motion for Summary Judgment

Defendant moves for summary judgment asserting that Plaintiffs do not state a cause of action because: (1) plaintiffs' claim of design defect fails because their expert's opinion lacks any basis in fact; (2) plaintiffs' claim of warning defect fails because the warnings provided were adequate and, because there is no evidence that the presence of additional warnings would have made a difference in Plaintiff's conduct; (3) plaintiffs' warranty claim must fail as a matter of law because there was no sale and because this claim is barred by the statute of limitations, and; (4) plaintiffs' strict liability claim must fail as a matter of law because there was no sale of the nailer.

Plaintiffs' expert opines that the contact trip nailer is defective by design and that all nailers should require the sequential trip method of operation. The expert opines that all contact nailers are defective due to their ability to "double fire" or to discharge a second, unwanted

fastener. Defendant contends that the expert's opinion has no basis in fact as he was not aware of Defendant's characterization of Plaintiff's description of the accident and therefore, based on Defendant's characterization, has no evidence to support his hypothesis that the gun "double fired."¹ Defendant also asserts that the warning provided on the gun was adequate as a matter of law, despite the expert's opinion to the contrary.² Defendant further avers that both Plaintiffs' action for strict liability and breach of warranty must fail because the nailer was not sold to Premium, but rather was part of a loan program between Defendant and Premium. Defendant maintains that the nailer, at all times, remained Defendant's property. Finally, Defendant maintains that Plaintiff's breach of warranty claim must fail as the statute of limitations has run. Defendant claims that the statute of limitations accrues on the date upon which the product is delivered. Maintaining such, Defendant avers that the nailer was delivered prior to Plaintiff's first day of work in April 1994, more than four years prior to the filing of this action in state court in July 1998.

Discussion

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

¹During Plaintiff's deposition, Plaintiff testified that the nail hit something and then fired back into his eye. Defendant maintains that it is possible that Plaintiff drove one nail into another or drove a nail into a nail previously embedded in an old piece of wood, a possibility that Plaintiff is said to have acknowledged during the deposition, but disputes in his later affidavits in response to the motion for summary judgment.

² The expert further opined that the warning should have advised users to wear protective eye gear and also should have advised of the possibility of being hit in the eye with a ricocheting fastener if no eye protection is worn.

of law." Fed.R.Civ.P. 56(c). Summary judgment is inappropriate, however, where a dispute regarding a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The evidence presented must be viewed in the light most favorable to the nonmoving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. See Celotex Corp. v. Catrett, 477 U.S. 316, 323 (1986), 106 S.Ct. 2548, 2552 (1986).

Viewing the evidence in the light most favorable to Plaintiff, genuine issues of material fact exist regarding Defendant's contentions and therefore preclude a grant of summary judgment. Defendant staunchly refutes Plaintiffs' expert's hypothesis that the contact nailer could have double fired and is defective by design due to its ability to fire without triggering. Defendant correctly states that in order to prevail on their strict liability claims, plaintiff's must establish that the nailer was defective, see Davis v. Berwind Corp., 547 Pa. 260, 690 A.2d 186, 190 (1997), and also that whether a product is defective is initially a question of law to be determined by the trial judge. Mackowick v. Westinghouse Elec. Corp., 525 Pa. 52, 575 A.2d 100, 102 (1990). The evidence, however, must be viewed in the light most favorable to Plaintiffs. Defendants maintain that the expert has no evidence upon which to base his conclusion that the nailer double fired. However, Plaintiff's Affidavit states that Plaintiff was in the process of placing the first nail into a new piece of wood when he was injured. Therefore, viewing the evidence in the light most favorable to Plaintiff, Plaintiffs' expert had a reasonable basis for reaching his conclusion that Plaintiff did not strike one nail atop another, but rather that

the nailer double fired. In its sur-reply to Plaintiff's Response, Defendant points out that Plaintiff's deposition testimony is contrary to the statement in his Affidavit. Any impeachment of Plaintiff's deposition testimony with the statements made in his Affidavit must be done at trial, not on a motion for summary judgment.

Secondly, Defendant asserts that Plaintiffs' claim of warning defect must fail because the warning on the nailer was adequate and because there is no evidence that the presence of additional warnings would have made a difference in Plaintiff's conduct, that is, not wearing protective eye gear. However, Plaintiffs claim there was no warning on the gun. This is simply another material fact which must be resolved at trial.

Finally, Defendant maintains that Plaintiffs' breach of warranty and strict liability claims fail as a matter of law, because there was no sale of the nailer. Plaintiffs, correctly point to Francioni v. Gibsonia Truck Corp., 472 Pa. 362, 372 A.2d 736 (1977)³ which held that the doctrine of strict liability extends to all suppliers of product for use or consumption by the public, including lessors. This court is bound by the holding of the Supreme Court of Pennsylvania Supreme Court's in Francioni which extends strict liability to lessors based on the following factors:

(1) the lessor, like the seller, may be the only member of the marketing chain available to the injured plaintiff for redress; (2) as in the case of the seller imposition of strict liability upon the lessor serves as an incentive to safety; (3) The lessor will be in a better position than the consumer to prevent the circulation of defective products; and (4) the lessor can distribute the cost of compensating for injuries resulting from defects by charging for it in his business.

³ Cucchi v. Rollins Protective Services, Co., 574 A.2d 565 (1990) similarly holds that express and implied warranties apply to a lease of goods transaction. This court will also extend the court's reasoning in Cucchi to the instant matter.

Id. at 472 Pa. 379, 372 A.2d 739. Based in part on Defendant's statement that the nailer provided was a "loaner" and that it was provided as a business incentive, I conclude that under Pennsylvania law, Defendant acted is subject to the doctrine of strict liability in this instance. Lastly, Defendant asserts that these claims must fail as the statute of limitations has run. As Plaintiff correctly states, under Pennsylvania law the statute of limitations does not begin to run until the alleged defect is discovered.

Conclusion

Because several issues of material fact regarding Plaintiffs' claims exist, this court finds that an award of summary judgment is not appropriate at this time. Defendant's Motion for Summary Judgment will be denied.

An Order follows.

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Plaintiff,	:	CIVIL ACTION
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v.	:	No. 98- CV-5657
	:	
STANLEY-BOSTITCH, INC.	:	
Defendant.	:	

ORDER

AND NOW, this day of May 2000, **IT IS HEREBY ORDERED** that
Defendant's Motion for Summary Judgment is DENIED.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.